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IN THE COURT OF APPEALS OF INDIANA

JONATHAN J. BIRK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A05-0710-CR-597
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable Jeffrey V. Boles, Judge
Cause No. 32C01-0703-FB-4

APRIL 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Jonathan Birk appeals his convictions by jury of two counts of sexual misconduct with a minor, one as a class B felony and the other as a class C felony. We affirm.

Birk raises the following two issues for our review:

I. Whether the trial court erred in denying his motion to sever; and

II. Whether the trial court erred in admitting evidence.

In the summer of 2006, L.L. told her best friend A.V. that twenty-three-year-old Birk molested her during the summer of 2004. Indiana State Police Detective Brian Smith interviewed L.L. in November 2006. During the interview, L.L. told the detective that while she was spending the night at her aunt's apartment in Brownsburg in July 2004, Birk touched her breasts underneath her bra, touched her vagina both over and underneath her underwear, and attempted to place his finger into her vagina. L.L. told the detective she pulled away when she felt the penetration. L.L. also told the detective that Birk grabbed her hand and made her massage his penis, and that Birk ejaculated while she was massaging his penis.

In a December 2006 interview with Detective Smith, Birk admitted that he had massaged L.L.'s back and thighs and unhooked her bra. He explained that he could have touched her breasts but made sure to stay away from L.L.'s vagina. He also denied that L.L. touched his penis.

In March 2007, the State charged Birk with 1) sexual misconduct with a minor as a class B felony for penetrating L.L's vagina with his finger on or about July 29, 2004 to July 29, 2005 at Brownsburg Crossing Apartment Complex; 2) sexual misconduct with a minor for performing fondling or touching with L.L. with the intent to arouse or satisfy

the sexual desires of either L.L. or himself on or about July 29, 2004 to July 29, 2005 at Brownsburg Crossing Apartment Complex; 3) sexual misconduct with a minor for performing fondling or touching with L.L. with the intent to arouse or satisfy the sexual desires of either L.L. or himself on or about July 29, 2004 to July 29, 2005 at Brownsburg Crossing Apartment Complex; 4) dissemination of matter harmful to minors for showing nude images of men to L.L. and her cousin, B.M., on or about October 3, 2005 to August 2006; and 5) voyeurism for peeping in the dwelling of his neighbor C.W. without her consent on or about April 2005 at Brownsburg Crossing Apartment Complex.

At trial, L.L testified that during the summer of 2004, when she was fourteen years old, she often spent the night at the Brownsburg apartment that her aunt shared with Birk. One night while L.L.'s aunt and cousin were sleeping, Birk insisted on giving L.L. a massage in the living room where she was watching television. Birk instructed L.L to sit between his legs on the edge of the couch while he massaged her back. During the massage, Birk unhooked L.L.'s bra and touched her breasts with his hand. Although she was unsure whether Birk had ejaculated, L.L. noticed that the back of her shorts were wet.

Birk further instructed L.L. to sit next to him on the floor. Birk took L.L.'s hand and directed her to massage his upper thigh and groin. He then pulled up his shorts, exposed his penis and testicles to L.L., and took her hand and directed her to massage his penis. Birk then began massaging L.L.'s upper thigh and groin with his hand. He also touched L.L.'s vagina with his hand both over and underneath her underwear, and started

to insert his finger into her vagina. When L.L. felt pressure inside her vagina, she pulled away. Birk told L.L. he did not want her aunt to know what had happened.

During cross-examination, defense counsel questioned L.L. about inconsistencies between her trial testimony and her November 2006 statement to Detective Smith. Specifically, defense counsel pointed out that L.L.: 1) told Detective Smith that she did not know whether the sexual misconduct occurred in 2003 or 2004 and testified at trial that it occurred in 2004: 2) told Detective Smith that Birk was intoxicated and testified at trial that she didn't know whether Birk was intoxicated; and 3) told Detective Smith that Birk ejaculated while she was massaging his penis and testified at trial that he may have ejaculated while he was massaging her breasts. Defense counsel also pointed out that in a previous deposition, L.L. told counsel that she thought Birk had an erection, and at trial, she testified that she did not know whether Birk had an erection.

L.L. and her cousin B.M. testified that Birk showed them photographs of tattooed penises. Also at trial, C.W., Birk's former neighbor at the Brownsburg apartment complex, testified that Birk peeped into her apartment several times, including one time when she had just gotten out of the shower and was naked. During cross-examination, defense counsel suggested that Birk was outside smoking and walking his dog. The Brownsburg Police Department officer that responded to the woman's report of voyeurism testified that he told the woman to close her blinds.

The trial court granted Birk's motion for a directed verdict on the dissemination charge. The jury convicted him of the class B felony sexual misconduct with a minor as well as one count of the class C felony sexual misconduct with a minor. He was

acquitted of the second class C felony sexual misconduct with a minor count as well as the voyeurism count. The trial court sentenced him to a ten-year sentence, which was suspended to probation. Birk appeals.

Motion to Sever

In May 2007, Birk filed a motion to sever the voyeurism count from the other four counts, which the trial court denied. Birk argues that the trial court erred in denying his motion. Specifically, he contends that by allowing a jury trial on all five offenses, he was prejudiced because the jury could not distinguish the evidence relevant to each specific offense. The State responds that the charges were properly joined together because they were based on a series of acts that were connected together.

We begin our review with the relevant statues. Indiana Code Section 35-34-1-9(a) provides as follows:

> Two or more offenses may by joined together in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

In addition, Indiana Code Section 35-34-1-11(a), provides as follows:

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court

> determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
> (2) the complexity of the evidence to be offered; and
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Thus, severance is a matter of right under subsection 11(a) only when the offenses are joined *solely* because they are of the same or similar character. However, if the State establishes that all offenses are sufficiently linked together, the matter of severance is to be determined by the trial court. Charges may be sufficiently linked together if they are connected by a distinctive nature, a common modus operandi linked the crimes, and the same motive induced the criminal behavior. *Blanchard v. State*, 802 N.E.2d 14, 25 (Ind. Ct. App. 2004).

Here, the voyeurism charge was sufficiently linked to the three sexual misconduct charges. All of the offenses were committed at the same location, the Brownsburg Crossing Apartment Complex, and during the same time period. Further, the motive for the crimes was similar in that they were all committed for sexual gratification. We find that the charges brought against Birk were not joined *solely* because they were of the same or similar character. Rather, they were joined because of the series of acts connected together. *See* I.C. § 35-34-1-9(a). Based on the facts above, we find sufficient evidence of a distinctive nature, common modus operandi, and motive linking the charges. *See Blanchard*, 802 N.E.2d at 26. Thus, severance was not mandated.

Accordingly, pursuant to I.C. § 35-34-1-11(a), severance became a matter within the trial court's discretion, taking into account: (1) the number of offenses charged; (2)

the complexity of the evidence to be offered; and (3) whether the trier of fact would be able to distinguish the evidence and apply the law intelligently as to each offense. *See* I.C. § 35-34-1-11(a). A denial of severance will only be reversed upon a showing of clear error. *See Blanchard*, 802 N.E.2d at 26.

Here, Birk was charged with five separate offenses: three involving Birk's sexual misconduct against L.L., one involving Birk showing photographs of tattooed penises to L.L. and B.M., and one involving Birk peeping at a neighbor at the Brownsburg apartment complex. The evidence for each charge was not complex. The fact that the jury could distinguish the evidence and apply the law intelligently is shown by their verdict. Specifically, the jury convicted Birk of two of the sexual misconduct charges and acquitted him of one of those charges as well as the voyeurism charge.

We therefore conclude that even though the charges were joined, the jury could make a fair determination as to Birk's guilt. *See* I.C. § 35-34-1-11(a). The trial court did not abuse its discretion in denying Birk's motion to sever. *See Blanchard*, 802 N.E.2d at 26.

Admission of Evidence

We will reverse a trial court's decision regarding the admission of evidence only for an abuse of discretion. *Flake v. State*, 767 N.E.2d 1004, 1009 (Ind. Ct. App. 2002). An abuse of discretion occurs only when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Id.*

Birk contends that the trial court erred in admitting into evidence L.L.'s statement to Detective Smith and A.V.'s testimony that L.L. told her that Birk had molested her.

Specifically, Birk claims that the statements are inadmissible hearsay. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. *Ballard v. State*, 877 N.E.2d 860, 861 (Ind. Ct. App. 2007)(citing Evid. R. 801(c)). Here, however, the challenged statements were not offered as proof of Birk's sexual misconduct. Rather, the statements were offered to rehabilitate L.L. after defense counsel impeached her during cross-examination with prior inconsistent or equivocal statements. When prior statements are used to impeach or rehabilitate a witness they are not hearsay because they are not used to prove the truth of the matter asserted. *Moreland v. State*, 701 N.E.2d 288, 292 (Ind. Ct. App. 1998).

In *Moreland*, the trial court allowed the State to rehabilitate its witness, an alleged child molestation victim, following a cross-examination that created numerous inconsistencies between the victim's trial testimony and deposition testimony. Specifically, the trial court allowed the State to call as witnesses a social worker and a police detective, who testified as to what the victim told them had occurred between her and the defendant. On appeal, we characterized the State's efforts as the introduction of prior consistent statements to rehabilitate a witness and found no error. *Id* *See also Flake v. State*, 767 N.E.2d at 1011 (holding that the trial court did not err in allowing the State to rehabilitate the victim with prior consistent statements). Here, as in *Moreland* and *Flake*, the trial court did not err in admitting into evidence L.L.'s prior consistent

statements to rehabilitate her after defense counsel impeached her with prior inconsistent statements.[1]

Affirmed.

BAILEY, J., and CRONE, J., concur.

[1]Birk concedes that *Flake* and *Moreland* state that prior consistent statements are admissible to rehabilitate a witness whose credibility has been impeached on the stand. However, he argues that *Bouye v. State*, 699 N.E.2d 620 (Ind. 1998), appears to be in conflict with those cases because a footnote in that case states that a simple attack on the credibility of a witness does not entitle the sponsoring party to introduce the witness' prior consistent statement. The issue in *Bouye*, however, is distinguishable from the issue before us. Specifically, the issue in *Bouye* was whether a co-defendant's statement was a hearsay exclusion under Evid. R. 801(d), not whether the statement was admissible as rehabilitative evidence. *Bouye* is therefore not determinative, and Birk's argument fails.

We would further note that in order for a prior consistent statement to be admissible under Rule 801(d)(1)(B), it must have been made *prior* to the creation of the motive to fabricate. Birk's contention is that L.L. fabricated her allegations against him because she did not want her aunt to move away with Birk to Virginia. Here, the statement to Detective Smith was made in November 2006, *after* L.L.'s aunt had married Birk and moved with him to Virginia and which arguably would have given rise to a motive on the part of L.L. to fabricate her allegations. Accordingly, under Indiana law, the prior statement is not admissible as substantive evidence but only to rehabilitate the witness. *See Moreland*, 701 N.E.2d at 292; 13 *Miller, Indiana Evidence* § 613.208 (2007).